Filed 6/29/10 Gay v. Dunbar CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHARLES W. GAY, Plaintiff and Respondent, v. CHRISTINE A. DUNBAR, Defendant and Appellant.	A125421 (Lake County Super. Ct. No. CV 400563)

Marianne Gay, the mother of plaintiff Charles Gay and defendant Christine Dunbar, died after a short and sudden illness in 2003. Although Marianne's will directed her estate to be divided equally among her three children, in the six months before her death Marianne had transferred the bulk of her assets into joint ownership with Christine. As a result, upon Marianne's death, Christine became the legal owner of most of Marianne's estate. Charles sued Christine, alleging that Marianne had intended Christine to hold the assets in trust and divide them among all three children, as reflected in her will. The evidence of Marianne's intent was in sharp conflict at trial, but the court found clear and convincing evidence she intended Christine to hold the property in trust and imposed a constructive trust on the assets. Christine contends the judgment was not supported by the evidence and challenges an award of attorney fees to Charles under the common fund doctrine. We affirm.

I. BACKGROUND

Charles "Ed" Gay and Marianne had three children, Charles, Christine, and Denise Thompson.[1] Marianne, a "strong-willed" and "opinionated" person, was a financially competent woman who had worked most of her life as a bookkeeper. Ed died in October 2002, followed only a few months later by Marianne in March 2003. The couple had executed identical wills leaving their property to their children in equal shares. During the short period after Ed's death, however, Marianne made Christine a joint owner of the bulk of the couple's assets, potentially frustrating the planned equal distribution of the estate. The issue at trial was Marianne's motive for making these changes. The litigants, Charles and Christine, told very different stories.

According to Christine, Marianne decided to leave a disproportionate share of the estate to her because Marianne was worried about Christine's financial security. In 2001, Christine had been working for Imperial Bank for well over 10 years, the last three in Concord, after residing 23 years in Southern California. In July that year, her position with Imperial Bank was eliminated in a corporate buy-out, and Christine was given the choice of returning to Southern California or accepting a generous severance package. Christine elected to quit, moved in October to Lake County where her aging parents lived, and made no immediate attempt to locate new employment. While her motive for moving may have been in part concern for Ed, who had been diagnosed with what would prove to be terminal cancer, the move provided Christine the opportunity to share a home with a Lake County man with whom she had been conducting a romantic relationship since 1997. It does not appear to have been until the following March, when Ed started chemotherapy, that he required special care. From that time on, however, Christine

[1] For clarity, our convention in matters involving family members is to refer to them by their first names. We intend no disrespect in doing so.

devoted herself to her father. During September 2002, the last month of Ed's life, Christine moved into her parents' home to better care for him.[2]

For much of the time after Ed's death, Marianne suffered from declining health, including fatigue, depression, and small strokes, but she continued to handle her own financial affairs, kept up her social life, and was physically active. She showed no signs of dementia, and there was little indication she would outlive Ed by only six months. Yet Marianne developed pneumonia in late February 2003 and died in mid-March.

After Marianne's death, it was learned that on October 15, 2002, two weeks after Ed's death, she had named Christine a co-owner of the savings account that held most of her nonreal property. Marianne entitled ownership of the account, "Marianne H. Gay &ATF Christine Dunbar." Although "&ATF" is presumably an abbreviation for "as trustee for," a designation often used in making inter vivos testamentary dispositions, there is otherwise no direct evidence of Marianne's purpose in making the change of ownership.[3] It appears Marianne did not tell any of her immediate family she had made the change; Christine testified she only learned of it after Marianne's death.

In addition, on December 31, 2002, Marianne had recorded a deed transferring title to the family home from Ed and Marianne, in joint tenancy, to Marianne and Christine. Christine was aware of this change, having accompanied Marianne when she executed and recorded the new deed, and testified Marianne told her she did so because "[s]he was leaving the property to me" out of concern for Christine's financial condition. By that time, Christine had exhausted her severance payments from the bank, had not yet located new employment, and was living on her savings.

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[2] Although Charles was unemployed and living in a second unit at the family home during Ed's illness, Christine said he played little role in Ed's care. Denise agreed with this characterization, but Charles disputed it.

[3] This form of account, in which the account holder is designated as trustee for another person, is referred to as a "Totten trust" and is commonly used as a method of testamentary disposition. (*Estate of Allen* (1993) 12 Cal.App.4th 1762, 1766; Prob. Code, § 5302, subd. (c).)

Denise and Marianne's best friend, Ellen Dusick, both testified that Marianne had made comments to them indicating concern about Christine's financial condition. As far as the record reflects, however, Marianne did not tell anyone other than Christine that she intended to leave a disproportionate share of her assets to Christine. This included Denise, the daughter she effectively would disinherit. On the contrary, Denise testified that her mother did not favor any one of her children over any other and had never spoken about leaving her property selectively to one of the children. Denise did not learn about the state of title of her mother's property until after Marianne's death.

In contrast to Christine's version, Charles testified Marianne made the title changes as an estate planning device, without intending to alter her and Ed's plans for the distribution of their property. Charles had lived in Washington State for much of his adult life, but he had moved back to his parents' home in Lake County in 1999, after suffering an employment-related injury. By the time of his father's illness, Charles was living in an apartment on his parents' property, supporting himself on disability compensation payments. He may also have earned money doing odd jobs.

Charles testified he had a conversation with his mother about two months after his father died. Marianne was distressed because she had just learned she had paid a bill twice, having received the second check by return mail. Charles suggested Marianne turn over control of her finances to Christine. During the conversation, Marianne told him she intended to join Christine, who was designated as the executor of her estate, on the title to her home, car, and bank accounts in order to avoid probate. Despite the planned changes of title, Charles said, she intended her property to be divided according to the terms of her will, giving equal shares to each child. Although Marianne had made Christine a joint owner of her primary savings account some six weeks prior to this conversation, she apparently did not tell Charles about that change.

Like Christine's account, there was little direct evidence to support Charles's version. At his deposition, Charles said he had overheard Marianne tell several of her friends and neighbors about this intent, but only one of them confirmed his story. Although Charles said he had heard Marianne repeat this intent to Dusick during a

telephone call, Dusick said Marianne had never spoken to her about her estate plans or financial affairs, saying only, on one occasion, her "paperwork was all taken care of." Charles also testified to similar conversations between his mother and two other sets of friends or neighbors, the Walkers and the Pillows. Both Walkers denied any such conversation. Mr. Walker was aware Ed had intended that the children would share in the property equally, but Marianne never spoke to him about the estate after Ed's death. Mrs. Walker said neither Ed nor Marianne spoke with her about the estate, other than perhaps indicating Christine was to act as executor to prevent the children from "fighting." Both Pillows also said they never spoke with either Ed or Marianne about their estates, other than Ed once said they intended to utilize a trust.

Support for Charles's version did come from Majorie Tuck, a neighbor of the Gays for several years in Lake County. During a conversation at the family home shortly after Ed's death, Marianne told Tuck she intended to have the home split among the three children upon her death. She also said she was putting her home, car, and bank accounts in joint ownership with Christine. At her deposition, Tuck was unable to recall whether Charles and Christine, who were in the house at the time, actually overheard the discussion. At trial she became more certain that Charles participated, but she equivocated about Christine.

Charles filed a complaint against Christine in June 2004, alleging the transfers to Christine had been made with the intent the assets would be divided among the children and seeking to impose a constructive trust requiring their equal distribution. He eventually joined Denise as a third party plaintiff in the action. The matter was tried to the bench in August 2007, but the judge did not render his decision until a year later, after substantial prodding by both parties. In its tentative decision, the court ruled in Charles's favor, finding Christine's testimony lacking in credibility. It faulted as "not accurate or realistic" Christine's testimony Marianne was in good health until soon before her death, relying on medical records showing a number of physical and emotional problems during that time. The court also cited a conflict in Christine's testimony recounting the first time she told Charles about the joint tenancy deed. It reasoned that "[b]ecause of these and

other inconsistencies in her testimony, the Court finds that she is not a credible witness" and discounted the remainder of her testimony. Relying largely on Tuck, whom the court found to be a "creditable, disinterested witness," the court held "the assets were transferred to [Christine] with the implicit understanding that whatever remained at her death would be divided equally among the three children." The court's subsequent statement of decision made similar findings, concluding Marianne's intent to have all three children recover equally was supported by clear and convincing evidence and finding a confidential relationship existed between Marianne and Christine.

The court's tentative decision declared Christine to hold the bank account and real property in trust for Marianne's estate and directed them to be transferred to the estate. The court also awarded Charles costs and attorney fees "as extraordinary fees in the probate matter." After Christine objected the court lacked jurisdiction to award fees in a probate proceeding over which it was not presiding, however, the court reversed that direction and ordered Denise to pay half of Charles's fees under the common fund doctrine.

II. DISCUSSION

Christine contends the trial court's decision was not supported by the evidence. Although, as discussed below, the trial court was required to find the trust elements by clear and convincing evidence, we apply the ordinary substantial evidence standard of review to its factfinding. (*In re Cole C.* (2009) 174 Cal.App.4th 900, 916; *Cutrera v. McClallen* (1963) 215 Cal.App.2d 604, 608.) "Under the substantial evidence standard of review, we review the entire record to determine whether there is substantial evidence supporting the [court's] factual determinations [citation], viewing the evidence and resolving all evidentiary conflicts in favor of the prevailing party and indulging all reasonable inferences to uphold the judgment [citation]. The issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact. [Citation.] Credibility is an issue of fact for the trier of fact to resolve [citation], and the testimony of a single witness, even a party, is sufficient to provide substantial evidence to support a factual

finding [citation]." (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 170–171.) Under this standard, we are without power to substitute our deductions for those of the trial court. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 788.)

In challenging the trial court's decision, Christine attacks many of its individual factual findings as unsupported. The question before us, however, is not whether each of the individual facts found by the trial court is supported by substantial evidence. Rather, we must decide whether substantial evidence was presented to support the elements of Charles's claims. Accordingly, we do not address all of Christine's claims of error, omitting discussion of those facts not essential to Charles's causes of action.

A. *The Savings Account*

Because the imposition of a trust with respect to the two assets under consideration is subject to different legal standards, we consider the savings account and the home separately.

A writing is not required to create a trust in personal property. (*Cutrera v. McClallen, supra,* 215 Cal.App.2d at p. 607.) An oral trust in personal property is created by a manifestation of intention of the trustor to create a trust and the presence of trust property, a lawful trust purpose, and an identifiable beneficiary. (*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754, 767, disapproved on other grounds in *Episcopal Church Cases* (2009) 45 Cal.4th 467, 491.) The intention of the trustor to create a trust may be derived not only from his or her words, but also from his or her acts and the surrounding circumstances. (*Cutrera v. McClallen*, at p. 608.) While an oral declaration of intent to create a trust, standing alone, is insufficient to support the creation of a trust of personal property (Prob. Code, § 15207, subd. (b)), such a declaration becomes sufficient if accompanied by the actual or constructive delivery of the trust property. (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15207, p. 542.) A trust of personal property may be proven by parol evidence, but the elements of the trust

must be proven by clear and convincing evidence. (*Monell v. College of Physicians & Surgeons* (1961) 198 Cal.App.2d 38, 48; Prob. Code, § 15207, subd. (a).)[4]

The issue in dispute here is Marianne's intent; there is no debate that, if she intended to create a trust in the savings account, the trust possessed appropriate property, a lawful purpose, and identifiable beneficiaries. There is little direct evidence of Marianne's purpose in changing title to the savings account. Although she made the change in October 2002, two weeks after Ed's death, there is no evidence she ever told anyone she had done it. By creating a Totten trust, Marianne presumably intended the funds to pass to Christine upon her death, but such a disposition is consistent with an intention that Christine hold the account as trustee for all three children for distribution in the manner described in Marianne's will, as well as an intent for Christine to inherit the entire account.

Despite Marianne's failure to explain herself, there was substantial evidence to support the trial court's finding of intent to create a trust in the testimony of Charles and Tuck regarding Marianne's general expressions of intent. Tuck testified to a conversation that occurred around the time Marianne changed the title to the savings account. Marianne told Tuck, in the presence of Charles and in the vicinity, if not the presence, of Christine, that she planned to put her primary assets in Christine's name, but have them be divided equally among the three children upon her death. In Charles's conversation with his mother, she repeated this intent. Because these expressions of intent were accompanied by the constructive delivery of the trust property to Christine, in the form of the change in title to the savings account, they are sufficient to support the finding of a trust. (*California-Nevada Annual Conf. of the United Methodist Church v.*

[4] The requirement of clear and convincing evidence can also be derived from two other code sections. Under Evidence Code section 662, the owner of legal title to property is presumed to be the beneficial owner, a presumption that can be refuted only through clear and convincing evidence. In addition, the designated beneficiary of a Totten trust becomes owner of the account upon the death of the trustee, in the absence of clear and convincing evidence of a different intent. (Prob. Code, § 5302, subd. (c)(2).)

St. Luke's United Methodist Church, supra, 121 Cal.App.4th at p. 767; Prob. Code, §§ 15200, 15207.)

Christine contends Charles's account of his conversation with their mother was so flawed as not to be credible. It is true Charles's account of the critical conversation was problematic. Charles claimed the idea to place assets in Christine's name had originated during that conversation, but Marianne had made the change in title to the bank account well over a month before. Although Charles testified at trial it was his mother's idea to put Christine on the titles, during his deposition he had twice insisted it had been his idea. While the primary impetus behind the changes in title was, according to Charles, to allow Christine to begin paying bills, Marianne never made a change to the title of her checking account to permit this. Finally, when Marianne's checks were examined and put in evidence at trial, there were no duplicates, despite Charles's claim a double payment was the immediate cause of their conversation.

Under the substantial evidence standard of review, it is not our place to judge witness credibility. Yet even if Charles's testimony is disregarded, substantial evidence would remain to support the trial court's finding. As the trial court noted, it was relying primarily on Tuck's testimony, which the court found to be reliable. While Tuck's husband was a good friend of Charles, there was no other basis for questioning the truth of her testimony, and the mere friendship of her husband is no ground for rejecting her testimony. Further, other circumstances supported the finding. Judging from their wills, Marianne and her husband had long intended their children to share equally in their estates. The universal testimony was that Marianne trusted Christine more than her other two children to handle financial affairs. Christine was, for example, the first-named surviving executor in Marianne's will. There is no reason to doubt that if Marianne were to leave property to just one of her children in trust to simplify probate, Christine would have been the child. Finally, there was no evidence of a rift between Marianne and her other children that might have motivated their disinheritance. Although Marianne, by all accounts, was not fond of Charles's girlfriend, she bore Charles himself no apparent grudge, and there was no evidence of any tension between Denise and her mother.

Other than an inference from Marianne's later conversation with Christine about the house, there was no evidence to refute this intent with respect to the savings account. While Marianne fretted with others about Christine's financial condition, she told no one she was sufficiently concerned about Christine to disinherit her other two children. In fact, Christine's financial condition was not particularly dire. Although she had used up her severance pay and some of her savings, she was healthy, close to her prime working years, and possessed of sufficient skills and experience to secure new and substantial employment.

B. *The Family Home*

Under the statute of frauds, the law does not recognize an oral trust in real property. (Prob. Code, § 15206; *Quezada v. Hart* (1977) 67 Cal.App.3d 754, 759.) Nonetheless, under certain circumstances the remedy of constructive trust will be invoked to accomplish the same purpose. (*Lauricella v. Lauricella* (1911) 161 Cal. 61, 67; *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shaprio, LLP* (2007) 150 Cal.App.4th 384, 398.) In very general terms, three elements must be demonstrated to invoke this remedy: (1) the existence of a res, (2) the right of a complaining party to the res, and (3) some wrongful acquisition or detention of the res by another party who is not entitled to it. (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 920.) Again, the intent to create a trust must be proven by clear and convincing evidence. (E.g., Evid. Code, § 662.)

Although the case law often asserts a constructive trust will be imposed when it is demonstrated the defendant has gained possession of the property through fraud, undue influence, or a confidential relationship, in practice the plaintiff need only demonstrate the trustee gained possession of the property through an agreement to hold the property in trust. That agreement can be explicit or implied from the circumstances. (See, e.g., *Neel v. Barnard* (1944) 24 Cal.2d 406, 411–412; *Allen v. Meyers* (1936) 5 Cal.2d 311, 314; *Lauricella v. Lauricella, supra,* 161 Cal. at p. 67; *Androski v. Thurber* (1955) 136 Cal.App.2d 471, 473, 475; Rest.3d Trusts, § 24, subd. (3), p. 346 & com. h, p. 355.)

When the court finds an agreement to hold the property in trust, the requisite wrongful acquisition or detention of the res is found in the refusal to honor that agreement.

An illustrative example is *Orella v. Johnson* (1952) 38 Cal.2d 693 (*Orella*). In *Orella,* a husband and wife borrowed money from the wife's daughter, the stepdaughter of the husband, to pay off their mortgage. Sometime later, the couple executed a deed conveying their house to the stepdaughter. Over the next few years, the stepdaughter sold the home, used part of the proceeds to pay off the debt, and used the remainder to buy the couple a new home, taking title in her own name. She later sold this home and bought the couple a different home, again taking title in her name. After the wife died, the stepdaughter refused the husband's request to convey this home to him. He filed suit, contending the original deed conveying the home to the stepdaughter was intended merely to be a deed of trust to secure the debt and, as a result, the stepdaughter should be found to hold title to the subsequent homes in constructive trust. (*Id.* at p. 695.) The husband, however, was unable to present any evidence that his stepdaughter had ever agreed to hold the home in trust. Instead, he testified the deed had been executed at the suggestion of his wife, who he presumed was acting on the stepdaughter's behalf. (*Id.* at p. 696.)

The Supreme Court found this testimony sufficient to justify the imposition of a constructive trust in favor of the husband. Regardless of whether there was a confidential relationship or fraud, the court noted, the stepdaughter would be unjustly enriched if she were permitted to retain title to the house. (*Orella, supra*, 38 Cal.2d at p. 697.) As a result, the court found it unnecessary to determine whether a confidential relationship existed, holding it would be a sufficient basis for imposition of a constructive trust if the deed were conveyed in reliance on an oral promise to reconvey. (*Id.* at p. 698.) In finding such an agreement existed, the court relied on conduct by the stepdaughter consistent with a recognition she was acting as trustee, noting the "most compelling" evidence was her original acceptance and recordation of the original deed, which put her

on notice to enquire about the purpose of the conveyance and permitted the inference her mother had told her of the husband's intention to create a deed of trust. (*Id.* at p. 699.)[5]

For the reasons discussed above, the testimony of Charles and Tuck provides substantial evidence to support the trial court's conclusion Marianne transferred the home to Christine with the intent and understanding it would be divided equally among the children after her death. Under *Orella*, this intent is sufficient to justify the trial court's imposition of a constructive trust on Christine's ownership of the family home, given the circumstances presented here. While there was no direct evidence of an express agreement between Marianne and Christine regarding the home, the trial court was entitled to infer from Christine's acceptance of title to the home without consideration that she understood, and impliedly agreed to, Marianne's purpose, as stated in her will and repeated to Charles and Tuck. (See, e.g., *Adams v. Young* (1967) 255 Cal.App.2d 145, 155 [an oral agreement to hold in trust can be proven by circumstantial evidence, without direct evidence of an agreement].) The finding of such an understanding was sufficient to support the imposition of a constructive trust on the home.

Christine contends there was no substantial evidence she was ever told by Marianne that the assets were to be divided equally between the children or made a promise to that effect. While we agree there was no *direct* evidence of an agreement between Marianne and Christine, there was adequate circumstantial evidence of an implicit agreement to support the trial court's decision. The transfer to Christine was made without consideration, which put Christine on notice to inquire as to the purpose for

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[5] Under the circumstances presented here, the Restatements of Trust and Restitution would permit the imposition of a constructive trust solely on the demonstration of an oral trust, without requiring fraud, a confidential relationship, or even an agreement to hold in trust. Section 183 of the Restatement of Restitution permits imposition of a constructive trust on any real property transferred to another under an oral trust when the transfer was made as a testamentary disposition. (*Id.*, subd. (c), p. 738 & com. f, p. 742.) Similarly, the Restatement of Trusts permits imposition of a constructive trust when the property was conveyed under an oral inter vivos trust if the trustor is dead or incompetent and the imposition of a constructive trust is necessary to prevent unjust enrichment. (Rest.3d Trusts, § 24, subd. (4), p. 346.)

the transfer (*Orella, supra*, 38 Cal.2d at p. 699), and there can be no dispute Christine was aware of her mother's testamentary plans.[6] The trial court could properly infer under the circumstances that, contrary to Christine's testimony, she understood the transfer of the home was made to her with the intent she would carry out those plans. Direct evidence of these elements was unnecessary.

Christine also contends Charles was required to present direct evidence of an agreement to hold in trust, citing *O'Donnell v. Murphy* (1911) 17 Cal.App. 625 and section 55 of the Restatement Second of Trusts. Because both *O'Donnell* and the Restatement section concern "secret trusts," however, they are irrelevant. A secret trust is created when a testator gives an unrestricted bequest on the promise that it will be used in a particular manner. (*O'Donnell v. Murphy*, at p. 629.) A legatee is not bound to use a bequest in any particular way, even if the testator expresses his or her intent, unless such an express promise has been made by the legatee. (*Ibid.*) The transfer to Christine was an inter vivos transfer, not a bequest. As *Orella* and the other cases cited above demonstrate, inter vivos transfers of property are treated differently from bequests.

The primary evidence refuting an understanding or agreement to hold in trust was the testimony of Christine, who said her mother told her the home was being left to her outright. The trial court found Christine's testimony to lack credibility, however, and it was entitled to reject Christine's testimony of her mother's statement, even though the testimony was not directly contradicted. (*Lombardi v. Tranchina* (1954) 129 Cal.App.2d 778, 780.) Under the substantial evidence test, we do not second-guess the court's findings on credibility. (*Fariba v. Dealer Services Corp., supra,* 178 Cal.App.4th at pp. 170–171.)

Although it is unnecessary under *Orella* for us to review the trial court's finding of a confidential relationship between Marianne and Christine, we also find substantial evidence to support this finding. A confidential relationship is similar in most respects to

[6] While Christine contends there was no testimony she was aware of those plans, it was clear from the testimony Christine knew Charles would be upset when he learned of the transfer because it was inconsistent with their parents' wills.

a fiduciary relationship (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270–271), but a fiduciary relationship arises as a matter of law from particular legal relationships, such as that of attorney and client, while a confidential relationship may result from "a moral, social, domestic, or merely personal relationship as well as . . . a legal relationship." (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382.) As a result, the existence of a confidential relationship is a question of fact, based on the individual circumstances of the parties. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1161.) A confidential relationship is created when a "vulnerable" party surrenders to a stronger party some degree of control because of the trust and confidence that the vulnerable party reposes in the other. (See generally *Richelle L. v. Roman Catholic Archbishop*, at pp. 271–272 & fn. 6.)

By the time Marianne conveyed the home to Christine, she had been rendered vulnerable by advanced age and deteriorating health. The testimony was uncontradicted that Marianne had always regarded Christine as the most reliable and competent of her children and reposed substantial trust and confidence in her, and the two had become closer during the months Christine spent caring for her father. It is apparent Marianne deeded the home to Christine on the basis of this confidence, trusting Christine to act fairly towards her siblings. It is presumably because of this confidence that she decided to pass the bulk of her estate through Christine, rather than by probate.

Christine contends the strongest evidence of Marianne's declining health, her medical records, should have been ruled inadmissible because the affidavit under which they were admitted was insufficient to qualify them for the business records hearsay exception. Under Evidence Code section 1560, a party may respond to a subpoena duces tecum by producing the relevant documents, accompanied by an affidavit containing the information required by Evidence Code section 1561, subdivision (a). Such records are admissible at trial "[i]f the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit" and if the requirements of Evidence Code section 1271 are met. (Evid. Code, § 1562.) Section 1271 requires, among other things, testimony about the "mode of

. . . preparation" of the documents sufficient to persuade the court that "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness."

The Evidence Code section 1561 affidavit accompanying these records states, "The records were prepared by personnel of the business with actual knowledge of the matters stated in the records and . . . the entries contained in the attached records were made at or near the time of the acts, conditions or events described." While this is minimal information about the mode of preparation of these records, we conclude the court did not abuse its discretion in concluding the information was sufficient under section 1271 to demonstrate their trustworthiness, given their nature as medical records.[7] The only relevant case cited by Christine, *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, was decided at a time when section 1561 did not require the affidavit to contain *any* information about the identity and mode of preparation of the documents. Compliance with section 1561 therefore did not satisfy all of the requirements of section 1271. (*Taggart*, at pp. 1707–1708.) That deficit has long since been corrected. (See Stats. 1996, ch. 146, § 1, p. 715 [amending Evid. Code, § 1561]; *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1045 [*Taggart* superseded by enactment of Evid. Code, § 1561, subds. (a)(4) & (5)].)

Christine also contends the records contained hearsay statements, thereby constituting double hearsay. Because Christine fails to identify a single specific hearsay statement in the records, it is impossible to evaluate her argument. To the extent the reference is to Marianne's own statements about her health, however, these are admissible under Evidence Code section 1561.

Christine also argues the existence of a family relationship alone cannot create a confidential relationship. (E.g., *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585.) While

[7] In her reply brief, Christine points to records from another patient erroneously included in Marianne's patient records. This type of self-evident error in responding to the subpoena duces tecum does not suggest the relevant records themselves are unreliable, and there is no indication the trial court relied on the erroneous records.

this is certainly true, the finding of a confidential relationship between Marianne and Christine is not based on their family relationship. Its basis is their relative positions and the particular trust Marianne placed in her daughter, as discussed above, not their status as mother and daughter.

Because we find both a confidential relationship and an implicit agreement to hold the property in trust, we need not address the trial court's finding of undue influence.

C. *Attorney Fees*

The trial court required Denise to pay one-half of Charles's attorney fees under the common fund doctrine. Christine contends Denise should not be required to share Charles's fees because Denise opposed Charles in the litigation and was represented by Christine's attorney.[8]

"The common fund doctrine recognizes the common law 'historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. . . . [¶] While the doctrine was first recognized and applied in a situation in which a common fund was created [citations][,] it was extended to an action where no fund was created but the party sharing in the attorney fee expense was benefited by the litigation." (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110–111.) "The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or

[8] Denise is not a party to this appeal, and Christine is not affected by the trial court's ruling on attorney fees. Nonetheless, we assume, without deciding, that Christine has standing to raise this issue on Denise's behalf.

recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." (*Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

Christine argues Denise was not a "passive" beneficiary of Charles's efforts, as required by the common fund doctrine (*Quinn v. State of California* (1975) 15 Cal.3d 162, 167), because Denise participated in the litigation, took a position opposed to Charles, and was represented by Christine's counsel. Regardless of Denise's posture in the litigation, however, there is no dispute that Charles's litigation was a financial benefit to Denise. The judgment considerably enlarged Marianne's estate, and Denise will benefit from that enlargement to the same extent as Charles. Further, there is no dispute Denise's participation in the litigation did nothing to contribute to her receipt of this financial benefit. Because Denise did not assist in the effort to obtain the judgment, it is consistent with the equitable principles underlying the common fund doctrine to require Denise to share Charles's attorney fees.

It is true, as Christine argues, the general principle is that " 'allowance of attorneys' fees for one party to be charged on the general fund where the other interested parties are represented by attorneys in the same litigation, will not be made. That such an allowance is justified only where the other parties have stood without counsel and would reap the benefits of the services rendered by the attorney conducting the proceedings. That where . . . the other interested parties all retain counsel, the equitable rule of paying from the general fund does not apply [citations].' " (*Estate of Stauffer, supra,* 53 Cal.2d at p. 134.) This rule, however, is based on the assumption the other parties, in being represented by counsel, have made equal efforts to obtain the successful judgment. (See, e.g., *Estate of Bullock* (1955) 133 Cal.App.2d 542, 547.) It simply recognizes that the equitable principles underlying the doctrine are not served by allowing a single party to obtain reimbursement of fees from a common fund when all parties incurred the expense of counsel and worked equally for the successful judgment. (*Ibid.*; *Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1276 ["The common fund doctrine rewards an active litigant only where there are other, passive members of the group who benefit from the outcome"].) In contrast, merely retaining counsel and participating in a litigation does

not insulate a litigant from the application of the common fund doctrine if that participation does not further the successful judgment. (See, e.g., *Kaplan v. Industrial Indem. Co.* (1978) 79 Cal.App.3d 700, 712–713; *Melendres v. City of Los Angeles* (1975) 45 Cal.App.3d 267, 275.)

Here, there is no evidence Denise, represented by Christine's counsel, actually incurred any attorney fees in connection with her participation in the litigation. Further, although she aligned herself with Christine for purposes of the litigation, there is no evidence she has disavowed the financial benefits that will flow to her from Charles's efforts. As a result, the trial court did not abuse its discretion in awarding attorney fees against her under the common fund doctrine.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, Acting P.J.

We concur:

_____
Dondero, J.

_____
Banke, J.